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NO. 88-246/87-2067

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1988

NO. 88-246

ROBERT A. BACHE, JR., ET AL
Petitioners

VERSUS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AT&T INFORMATION SYSTEMS, INC., SOUTH CENTRAL BELL TELEPHONE COMPANY, AT&T COMMUNICATIONS, INC. AND THE COMMUNICATION WORKERS OF AMERICA
Defendants

NO. 87-2067

JO B. BANKSTON, ET AL
Petitioners

VERSUS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL
Defendants

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the appellate court correctly affirmed the granting of South Central Bell's summary judgment motions in *Bache* and *Bankston*, when petitioners improperly instituted judicial proceedings before exhausting available administrative remedies.

2. Whether the District Court's grant of summary judgment was proper when petitioners failed to assume the burden of proof necessary to preclude such grant by showing the existence of genuine issues of material fact.

LIST OF PARTIES

In accordance with Supreme Court Rule 21.1 (b), petitioners submit the following list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed. The parties are, to-wit:

A. *List of Bache Petitioners*

1. Robert A. Bache, Jr.
2. Sandra H. Bush
3. Joseph D. Clay
4. Jules B. Cleland
5. Anthony L. Icamina, Sr.
6. Ronald J. Joachim
7. Earl C. Lanashire
8. Michael R. Lannes
9. Jaunice J. Matthews
10. Robert E. McCrudden
11. Larry L. Mennesses
12. James G. Milliken
13. Patrick O. O'Donnell
14. Ernest M. Perkins
15. Morris J. Reeson
16. Charles M. Thomas
17. Frank Vidal

B. *List of Bache Defendants*

18. American Telephone & Telegraph Company
19. AT&T Information Systems, Inc.
20. South Central Bell Telephone Company
21. AT&T Communications, Inc.
22. The Communication Workers of America

LIST OF PARTIES (continued)

C. *List of Bankston Petitioners*

1. Jo B. Bankston
2. Janet Bemiss
3. Amy B. Brandt
4. Mary Patricia Bush
5. Linda Butler
6. Bonnie B. Carrere
7. Wayne P. Catalano
8. Eileen Durel
9. Rochell Fugere
10. Iris Gueno
11. Joyce Gundermann
12. Raymond Lesene
13. Barbara Marto
14. Jeanne Piotrowski
15. Liesel Reuther
16. Sally Sensebe
17. Shirley Weaver

D. *List of Bankston Defendants*

18. American Telephone & Telegraph Company
19. AT&T Information Systems, Inc.
20. South Central Bell Telephone Company
21. AT&T Communications, Inc.
22. The Communication Workers of America

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NO. 87-2067 and NO. 88-246

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, South Central Bell Telephone Company, respectfully prays for denial of the writs of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered March 23, 1988 and May 11, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 840 F.2d 283 (Petitioners' Appendices A). The *Bache* petitioners' Petition for Rehearing was denied on May 11, 1988. (Petitioners' Appendices B). The opinion of the District Court for the Eastern District of Louisiana is not reported. (Petitioners' Appendices C).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

Petitioners brought these parallel proceedings to contest layoffs which their employer, American Telephone and Telegraph Information Systems ("ATTIS") was forced to institute due to poor economic conditions. Petitioners'

employment in ATTIS, in both the *Bache* and the *Bankston* suits, became effective on January 1, 1984, when they voluntarily transferred from South Central Bell Telephone Company ("South Central Bell") to ATTIS, subsequent to the American Telephone and Telegraph ("AT&T") divestiture. The *Bache* suit was filed on October 25, 1985, by ATTIS employees who were laid off between October 31, 1984 and December 15, 1984; the *Bankston* suit was filed on February 7, 1987 by ATTIS employees who were laid off in March, 1986.

Originally filed in the Civil District Court for the Parish of Orleans, State of Louisiana, against the same defendants, both cases were removed to the United States District Court for the Eastern District of Louisiana, basing jurisdiction on Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. On October 30, 1986, the district court entered summary judgment for the *Bache* defendants, ruling that the state law claims were preempted by §301 of the LMRA, and that the *Bache* plaintiffs had failed to show evidence supporting the essential elements of a §301 claim, i.e., breach of contract[1] and breach of a duty of fair union representation. The district court's grant of summary judgment in favor of South Central Bell was granted for the additional reason that the *Bache* plaintiffs failed to process grievances against South Central Bell; thus, their administrative remedies had not been exhausted.

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[1] The contract allegedly breached is the collective bargaining agreement known as the Amended Memorandum of Agreement ("AMOA") which was executed by AT&T and the Communications Workers of America ("CWA"). The contract contained provisions concerning the employment rights of AT&T employees who would transfer to new AT&T subsidiaries or affiliates as a result of the breakup of AT&T. *See, United States vs. American Telephone and Telegraph Co., et al.*, 552 F.Supp. 131 (D.D.C. 1982).

After removal, the *Bankston* court granted summary judgment as to all defendants, basing its judgment on the reasons previously set forth in the *Bache* opinion. By that time, *Bache* was on appeal in the Court of Appeals for the Fifth Circuit. When the *Bankston* appeal was entered, the two cases were consolidated since they were essentially the same suit. The Fifth Circuit affirmed both lower court decisions in its March 23, 1988 judgment. The *Bache* petition for rehearing was denied on May 11, 1988; no rehearing was sought in *Bankston*.

Essentially, *Bache* and *Bankston* are the same suits. Both arose out of the layoff of workers, pursuant to the terms of the same collective bargaining agreement. Both suits contain the same allegations, i.e., breach of contract, fraudulent misrepresentation, and breach of a duty of fair representation. Both cases involve the same defendants, and both cases were heard before the same district court judge, The Honorable Adrian G. Duplantier.

REASONS FOR DENYING THE WRIT

I. *Petitioners' failure to process their grievance precludes judicial proceedings.*

Insofar as it held, in both *Bankston* and *Bache*, that South Central Bell's Motion for Summary Judgment was proper because petitioners prematurely instituted judicial proceedings against this respondent, the Fifth Circuit decision is clearly correct; therefore, there is no reason for further review. This Honorable Court firmly established in *Vaca v. Sipes*, 386 U.S. 171 (1967), that a plaintiff must first seek to exhaust his administrative remedies before bringing judicial proceedings pursuant to a collective bargaining agreement. *See also, Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

In *Bache,* only one petitioner filed a grievance with the union against South Central Bell (Petitioners' Appendices C, page 13). No other *Bache* petitioner utilized the appropriate dispute mechanism against South Central Bell. The claim of the one petitioner who did file a grievance was dismissed on summary judgment along with the other claims because that petitioner presented no evidence supporting his claim. (Petitioners' Appendices C, page 14).

In *Bankston,* petitioners claim that the union refused to even process their grievances with ATTIS, but they made no claim that they even attempted to file grievances with South Central Bell. Even as to ATTIS, petitioners produced no evidence that they ever presented their grievances to the union for processing (Petitioners' Appendices A, page 54). Neither did petitioners present evidence of an arbitrary or bad faith refusal by the union to process the *Bankston* grievance. (Petitioners' Appendices A, page 51). The *Bankston* court agreed that, by the time the *Bankston* suit was brought, the National Labor Relations Board had already rejected the union's interpretation of the AMOA when it decided the Union's charge filed with the Board. The union was convinced that the layoffs resulted from economic conditions, not divestiture; therefore, the layoffs were contractually permissible and processing another grievance would have been futile. (Petitioners' Appendices A, page 52).

II. *Petitioners' failure to evidentially show the existence of material fact demanded entry of summary judgment in respondents' favor.*

The *Bache* Petitioners urge this court to reconsider the merit of their allegation of breach of a duty of fair union representation, yet petitioners failed, in the proceedings below, to support the charge with evidence. Petitioners'

support for their position was not evidential in nature; instead, it was merely the unilateral assertion that the union failed to represent them according to the terms of the contract as petitioners, alone, interpreted it. (Petitioners' Appendices A, page 42). In considering the issue, the Fifth Circuit quoted *Humphrey v. Moore,* 375 U.S. 335, 349 (1964) (citations omitted), which noted that unions must be afforded a wide range of reasonableness in exercising their discretion (Petitioners' Appendices A, page 44). The *Bache* court, following *Humphrey's* holding, correctly reasoned that "[t]o require the union to advocate an individual employee's view of [a] labor contract under the guise of 'fair representation of the collective interest" (Petitioners' Appendices A, page 43).

As in *Bache,* the *Bankston* petitioners failed to evidentially show the merit of their allegations, but in this appeal, the *Bankston* petitioners defend their failure by blaming the district court. They claim that they were not given sufficient time to conduct discovery. However, if petitioners did perceive this as a problem, they did not seek the appropriate remedy.

Rule 56(f) of the Federal Rules of Civil Procedure prescribes the proper response to a motion for summary judgment when the opposing party needs to conduct discovery. *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Applying the *Celotex* principles to this case, the Fifth Circuit concluded:

> [T]he court in *Celotex* cautioned that the nonmoving party must have adequate time for discovery, but the Court also stated that problems with premature motions could "be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on

> the motion to be continued." *Id.* at 2554-55. Under Rule 56(f), a party opposing the motion may show by affidavit "that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Fed.R.Civ.P. 56(f). The Bankston plaintiffs submitted no Rule 56(f) affidavits. . . . (Petitioners' Appendices A, page 55).

Although petitioners did file affidavits which were intended to show attempts to file grievances, the Fifth Circuit found them insufficient for their purpose. The court reasoned, "we cannot see how lack of discovery prevented [affiants] from stating in their affidavits specific facts to support their allegations, such as a date that they informed CWA of their grievances." (Petitioners' Appendices A, pages 55-56).

Petitioners now urge this court to accept those affidavits as Rule 56(f) affidavits *(Bankston* petition at page 15). However, the affidavits presented do not state the reasons why petitioners were not able, by affidavit, to justify their opposition to the motion, as Rule 56(f) instructs. The affidavits were never intended to fulfill a Rule 56(f) purpose, and cannot now be so construed.

CONCLUSION

For the foregoing resons, the petitions for writ of certiorari filed by the *Bache* and *Bankston* petitioners should be denied.

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